

1987

Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities

Elizabeth E. Stanulis

University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Banking and Finance Law Commons](#), and the [Business Organizations Law Commons](#)

Recommended Citation

Elizabeth E. Stanulis, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. Rich. L. Rev. 589 (1987).

Available at: <http://scholarship.richmond.edu/lawreview/vol21/iss3/7>

This Comment is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

CRIMINAL RICO: FORFEITURE OF FEES, SIXTH AMENDMENT RIGHTS, AND ATTORNEY RESPONSIBILITIES

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ is the most expansive criminal statute ever passed by Congress.² The statute and its amendments impose strict penalties for various activities associated with organized crime, including forfeiture of the proceeds of criminal activity.³ However, RICO's ambiguous language has caused confusion in its interpretation by federal courts.

Recently, differing interpretations by federal courts with regard to the forfeiture provisions of RICO have become a major concern for attorneys and their RICO clients. This comment will address RICO's general provisions and amendments, the attorney's fee as a "forfeitable interest" under RICO, and the constitutional and ethical concerns surrounding the attorney-client relationship in a RICO proceeding.

I. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

A. General Provisions

In 1970, Congress enacted the original version of the Organized Crime Control Act.⁴ In drafting RICO, the Senate Judiciary Committee intended to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce . . . by the fashioning of new criminal and civil remedies and investigative procedures."⁵

RICO incorporates by reference numerous federal and state crimes under the broad concept of "racketeering activity."⁶ The statute provides that anyone found to have committed any two of the incorporated offenses within a ten-year period has undertaken a "pattern of racketeering activity."⁷

1. 18 U.S.C. §§ 1961-68 (1982).

2. See Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. § 1961-68: *Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978).

3. See *infra* text accompanying notes 12, 28-29.

4. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68 (1982)).

5. S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969).

6. 18 U.S.C. § 1961(1)(1982) (crimes enumerated include murder, kidnapping, gambling, arson, and dealing in narcotics or other dangerous drugs).

7. See *id.* § 1961(5); see also *United States v. Riccobene*, 709 F.2d 214, 226-27 (3d Cir.) (pattern of racketeering established by proof that defendant committed two or more predicate offenses, which are specified illegal acts prohibited by state or federal law often associated with organized crime), *cert. denied*, 464 U.S. 849 (1983).

Section 1962 of the statute specifically prohibits the following four categories of activities by any person or by any organization: (1) using income received, directly or indirectly, from a pattern of racketeering activity to acquire an interest in an enterprise;⁸ (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;⁹ (3) conducting the affairs of an enterprise through a pattern of racketeering activity;¹⁰ and (4) conspiring to commit any of the above offenses.¹¹ Section 1963(a) of the statute provides that violations of section 1962 will result not only in fines and/or imprisonment for convicted individuals, but also in the forfeiture of any "interest" associated with the racketeering enterprise.¹²

8. 18 U.S.C. § 1962(a). For interpretation of section 1962(a) see *United States v. McNary*, 620 F.2d 621, 628-29 (7th Cir. 1980) (words "directly or indirectly" demonstrate that the statute contemplates situations in which racketeering monies will not be directly or immediately employed to establish enterprise and thus, statute on its face does not require direct use of illicit income to establish a violation of its terms), *cert. denied sub nom. Caulle v. United States*, 465 U.S. 1005 (1984).

9. 18 U.S.C. § 1962(b). A take-over of a legitimate enterprise through a pattern of racketeering activity is one form of misconduct punishable under this section. *United States v. Jacobson*, 691 F.2d 110 (2d Cir. 1982) (defendant acquired control over bagel bakery through collection of unlawful debt); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974) (acquisition of interest in corporation through purchase of stock), *cert. denied*, 419 U.S. 1105 (1975).

10. 18 U.S.C. § 1962(c). For an interpretation of section 1962(c) see *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980) (defendant conducts activities of an enterprise through a pattern of racketeering when he is able to commit predicate offenses solely by virtue of his position in, and control of, the enterprise, and predicate offenses are related to activities of the enterprise), *cert. denied*, 452 U.S. 961 (1981); *see also United States v. Melton*, 689 F.2d 679 (7th Cir. 1982) (carrying out business of construction company through acts of insurance fraud, arson, mail fraud, and extortion), *cert. denied sub nom. Tillie v. United States*, 469 U.S. 845 (1984); *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981) (RICO convictions based upon defendant's operation of drug enterprise out of nightclub owned by defendant), *modified*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977) (convictions of majority shareholders of corporation owning mobile home park operating illegal gambling operation out of basement of modular home located in park reversed for failure to show that an enterprise's interests were advanced), *cert. denied sub nom. Helfee v. United States*, 435 U.S. 951 (1978).

11. 18 U.S.C. § 1962(d); *see United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982) (agreement to establish or participate in enterprise through a pattern of racketeering activity is conspiring to commit a RICO offense), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Palmeri*, 630 F.2d 192, 200 (3d Cir. 1980) (overt acts committed in furtherance of conspiracy need not be illegal to support conspiracy prosecution), *cert. denied*, 450 U.S. 967 (1981). For an analysis of RICO's conspiracy element see Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385 (1983).

12. 18 U.S.C. § 1963(a). The defendant must forfeit:

(1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, participated in the conduct of, in violation of section

B. Forfeiture Provisions

As a criminal penalty, forfeiture operates *in personam*. At early common law, such forfeitures wrested from the defendant the entirety of his property rights upon conviction.¹³ Before the enactment of RICO, *in personam* forfeiture was virtually unknown to the federal criminal law.¹⁴ Under the present statutory scheme, RICO forfeiture is imposed as a punishment upon a finding of personal guilt in a criminal prosecution.¹⁵ Unlike common law forfeiture, however, RICO does not cause a forfeiture of a defendant's entire estate, but rather a forfeiture of a specific property interest in a criminal enterprise.¹⁶

The RICO forfeiture provisions were amended by the Comprehensive Forfeiture Act of 1984 (Forfeiture Act).¹⁷ These amendments enlarged the government's power to attack racketeering and were intended to clear up ambiguities in the statute's interpretation with regard to the meaning of a forfeitable "interest" and the rights of third parties who have received forfeitable assets.¹⁸

II. FORFEITABLE INTERESTS UNDER RICO

A. Pre-Amendment Cases

Prior to the 1984 amendments, the opinions of the federal circuit courts

1962.

Id. For a general discussion on the courts' early interpretations of the RICO statute see Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation*, 27 DE PAUL L. REV. 89 (1977).

13. *Russello v. United States*, 464 U.S. 16 (1983); see *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982) (en banc), *aff'd sub nom. United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated*, 439 U.S. 810 (1978), *on remand aff'd in part, rev'd in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976).

14. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974); *United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980); see also 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 68-71 (5th ed. 1942).

15. *Huber*, 603 F.2d at 396 (forfeiture is imposed directly on individual as part of a criminal prosecution, rather than in a separate proceeding *in rem* against property subject to forfeiture). For an overview of criminal forfeiture see Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U. L. REV. 227 (1982).

16. *Martino*, 681 F.2d at 964 (Politz, J., dissenting); *Rubin*, 559 F.2d at 991 n.15; *Thevis*, 474 F. Supp. at 140-41.

17. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 3302, 98 Stat. 1837, 2040-44 (amending 18 U.S.C. § 1963).

18. S. REP. NO. 225, 98th Cong., 2d Sess. 19-201, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374-76.

of appeal varied as to what property was subject to forfeiture under section 1963(a).¹⁹ Specifically, the courts disagreed as to whether or not profits derived from illicit business enterprises were a forfeitable "interest." The seventh circuit in *United States v. McManigal*,²⁰ and the ninth circuit in *United States v. Marubeni America Corp.*,²¹ held that assets subject to forfeiture included only *direct interests* in a racketeering activity and not the proceeds of that activity. In *United States v. Martino*, the fifth circuit, sitting *en banc*, interpreted section 1963 more expansively to allow for forfeiture of both the assets of the racketeering enterprise and its proceeds.²²

In *Russello v. United States*,²³ the United States Supreme Court affirmed the fifth circuit's holding in *Martino* that profits constitute a forfeitable interest under section 1963. The Court recognized that the forfeiture provisions of RICO as originally enacted were intended to have far-reaching effects. The "statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."²⁴

B. The 1984 Amendments

The 1984 amendments²⁵ reiterate the far-reaching purpose of the RICO

19. See *United States v. Jacobson*, 691 F.2d 110, 112-13 (2d Cir. 1982) (RICO statute covers property rights in leaseholds as well as interest in the enterprise); *United States v. McNary*, 620 F.2d 621, 629 (7th Cir. 1980) (RICO forfeiture provision operates on an interest in a travel service acquired with proceeds of illicit activities); *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977) (forfeiture provisions reach elective union positions held by defendant convicted under RICO), *vacated*, 439 U.S. 810 (1978), *on remand aff'd in part, rev'd in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). For a general discussion of property interests under RICO before the 1984 amendments see Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. Rev. 57 (1983).

20. 708 F.2d 276, 283-87 (7th Cir.), *vacated*, 464 U.S. 979 (1983) (judgment vacated in light of the holding in *Russello v. United States*, 464 U.S. 16 (1983)).

21. 611 F.2d 763, 766 (9th Cir. 1980); see also *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (forfeiture authorized by statute does not embrace the fruits of profits derived from operation of an illicit enterprise), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

22. 681 F.2d 952, 961 (5th Cir. 1982), *aff'd sub nom. Russello v. United States*, 464 U.S. 16 (1983); see also *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.) (the government may claim title to assets owned by third parties if the third party took possession with knowledge that these assets came from racketeering activities), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

23. 464 U.S. 16 (1983).

24. *Id.* at 26. "The sponsors of RICO intended to give the Department of Justice a new and effective tool in the war against organized crime. The intent of the sponsors, as reflected in the legislative history, was to strike at racketeering methods and money that infiltrated legitimate business. Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 397 (1980).

25. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 1837,

statute as recognized in *Russello v. United States*.²⁶ The Forfeiture Act leaves subsections (a)(1) and (a)(2) of section 1963, which provide for penalties of fines, imprisonment and forfeiture of assets associated with the racketeering enterprise, substantially the same.²⁷ A new subsection, (a)(3), which provides for forfeiture of direct or indirect proceeds of racketeering activity,²⁸ was added in response to pre-amendment cases. The legislative history clearly indicates that under this new subsection, RICO forfeitures reach the profits derived from racketeering enterprises.²⁹ In addition, the Forfeiture Act adds a new subsection, 1963(b), to define the types of assets subject to forfeiture.³⁰

The majority of the newly enacted provisions relating to post-conviction matters³¹ deal with procedural aspects of a RICO forfeiture. These new procedures provide for an entry of forfeiture of assets transferred to third parties by the defendant upon the defendant's convictions and verdicts of forfeiture.³² The burden then shifts to the third party to vacate the forfeiture order.³³ The third-party petitioner is provided an opportunity to present his case at a post-conviction hearing.³⁴ The amendments provide that assets transferred to the third-party petitioner will not be forfeited if (1) the petitioner demonstrates by a preponderance of the evidence that either his title to the property predated the violation, or (2) he

2040-44 (amending 18 U.S.C. § 1963). The Act's legislative history indicates "that [p]rofit is the motivation for . . . [racketeering and drug trafficking], and it is through economic power that it is sustained and grows." S. REP. NO. 225, 98th Cong., 2d Sess. 191, 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

26. *See supra* notes 23-24 and accompanying text.

27. *See* 18 U.S.C. § 1963(a)(1)-(2) (Supp. II 1984); *see also supra* note 12.

28. *Id.* § 1963(a)(3). The defendant shall forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." *Id.*

29. "Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes." S. REP. NO. 225, 98th Cong., 2d Sess. 191, 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

30. *See* 18 U.S.C. § 1963(b). This subsection adds no new substantive provisions, but only clarifies earlier ambiguities in the statute. "[P]roperty subject to forfeiture under the RICO statute may be either real property or tangible or intangible personal property . . . [this] intent [is] consistent with current law, that the concept of "property" as used in section 1963 is to be broadly construed." S. REP. NO. 225, 98th Cong., 2d Sess. 191, 200, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3383.

31. 18 U.S.C. § 1963(f)-(j), (l), (m).

32. *Id.* § 1963(g).

33. *Id.* § 1963(m)(6).

34. This post-conviction hearing is provided to third parties because a forfeiture provision that deprives innocent third parties of property may violate the due process clause. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-90 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 719-22 (1971).

was a bona fide purchaser for value without knowledge that the assets may have been illegally obtained, and thus subject to forfeiture.³⁵

C. *Are Attorney's Fees a Forfeitable Interest Under the RICO Statute?*

A defendant confronted with a RICO indictment may transfer money or property to an attorney, a third party, in an effort to retain the attorney for his defense. Is an attorney, therefore, a third party whose fees are subject to forfeiture within the meaning of the statute? A literal reading of the third-party-forfeiture provision in the statute would seem to encompass the legal fee.³⁶ An attorney hired to represent a defendant in a trial for RICO violations seemingly does not fall within either of the two exceptions which would allow him to vacate the forfeiture order.³⁷ An attorney's title to the property is unlikely to predate the alleged violations, and the attorney does not qualify as a bona fide purchaser without notice that the property may be subject to forfeiture.

In several recent decisions³⁸ federal district courts have expressed disagreement on the specific issue of forfeiture of attorney's fees. In *Payden v. United States*,³⁹ a defendant who was charged with organizing a continuing criminal enterprise sought to intervene to quash a *subpoena duces tecum* requiring his defense counsel to appear before the grand jury and disclose counsel's fee arrangement. The United States District Court for the Southern District of New York refused to quash the subpoena, ruling that it did not violate the defendant's sixth amendment right to counsel.⁴⁰

Although the issue of forfeiture of attorney's fees was not squarely before the *Payden* court,⁴¹ the court addressed the issue because eventual

35. 18 U.S.C. § 1963(m); see *United States v. Mandel*, 505 F. Supp. 189, 192 (D. Md. 1981) (statutory scheme of forfeiture provisions does not violate innocent third party's constitutional right to due process), *aff'd sub nom.* Appeal of Schwartz, 705 F.2d 445 (4th Cir. 1983).

36. See 18 U.S.C. § 1963(m) (Supp. II 1984); see also *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983) (property interests transferred to attorney as fee retained their character as profits of illicit enterprise, where attorney was put on notice by indictment that defendant's profits and property were subject to forfeiture), *cert. denied sub nom.* Bello v. *United States*, 469 U.S. 837 (1984); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) (restraining order valid in order to keep defendant from transferring plane to attorney as payment because attorney had notice).

37. 18 U.S.C. § 1963(m); see *supra* text accompanying notes 31-35.

38. See, e.g., *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

39. 605 F. Supp. 839 (S.D.N.Y. 1985).

40. See *Payden*, 605 F. Supp. at 848; see also U.S. CONST. amend. VI. The right only applies in criminal proceedings which result in imprisonment. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). It is operative from the initiation of formal adversary proceedings. *Brewer v. Williams*, 430 U.S. 387 (1977).

41. *Payden*, 605 F. Supp. at 849 n.14.

forfeiture of attorney's fees was the government's primary interest in obtaining the fee information.⁴² The *Payden* court decided that attorney's fees are forfeitable upon conviction, because the indictment of a defendant for a RICO violation constitutes notice to the attorney that the defendant's assets are subject to forfeiture.⁴³

The opinions in *United States v. Rogers*,⁴⁴ and *United States v. Badalamenti*⁴⁵ directly conflict with *Payden*. In *Rogers*, the defendants were indicted by a grand jury for RICO violations.⁴⁶ Contemporaneous with the filing of the indictment, the government petitioned the court for an order restraining the transfer of property.⁴⁷ Counsel for the defendants filed objections to the government's petition, and filed a motion to exclude attorney's fees from forfeiture.⁴⁸ The United States District Court for Colorado denied the government's motion,⁴⁹ and granted the defendant's motion to exclude attorney's fees on constitutional grounds.⁵⁰

In *Badalamenti*,⁵¹ the United States District Court for the Southern District of New York quashed a trial subpoena commanding a defense lawyer to testify and produce fee-related documents at the trial of his client.⁵² Both of the crimes charged against the client, racketeering (RICO) and conducting a continuing criminal enterprise (CCE),⁵³ triggered the operation of the comprehensive Forfeiture Act of 1984. Basing its decision on the sixth amendment and the attorney-client privilege,⁵⁴

42. *Id.* Anticipating an eventual indictment, Judge Edelstein of the New York district court disagreed with the Colorado district court's decision in *Rogers*, 602 F. Supp. 1332, which held that the government was not entitled to a preliminary order restraining attorney's fees. In an opinion rendered subsequent to the *Payden* decision Judge Mathey of the New York district court concluded that attorney's fees paid for legitimately rendered attorney's services are not forfeitable under the RICO statute. *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

43. *Payden*, 605 F. Supp. at 850 n.14.

44. 602 F. Supp. 1332 (D. Colo. 1985).

45. 614 F. Supp. 194 (S.D.N.Y. 1985); *see infra* note 56.

46. *Rogers*, 602 F. Supp. at 1334.

47. *Id.*

48. *Id.*

49. *Id.* at 1344-46 (the court denied the motion without prejudice to file an appropriate motion for a preliminary injunction; the government must produce specific information suggesting probability of success at trial).

50. *Id.* at 1351.

51. 614 F. Supp. 194 (S.D.N.Y. 1985).

52. *Id.* at 201. When a lawyer is called to testify against his client the lawyer may have an obligation to withdraw from the case. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1983).

53. 21 U.S.C. § 848(2)(B) (1982).

54. *Badalamenti*, 614 F. Supp. at 198; *see also* *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986) (attorney's fees are not a forfeitable interest under the provisions of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 848, 853 (1983), which has forfeiture provisions identical to those of the RICO statute); *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986) (attorney's fees are not a forfeitable interest

the *Badalamenti* court agreed with the *Rogers* court and declared that fees are not forfeitable as the proceeds of the client's alleged narcotics and racketeering activities.⁵⁵

III. CONSTITUTIONAL AND ETHICAL CONCERNS

A. Sixth Amendment Rights

The assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"⁵⁶ The right to counsel attaches at the initiation of formal judicial adversary proceedings, and continues through sentencing.⁵⁷ Application of the sixth amendment extends to all defendants in all federal and state criminal prosecutions that result in imprisonment.⁵⁸ The right entitles a defendant, who establishes his indigency,⁵⁹ to the assistance of court-appointed counsel.⁶⁰

under the provisions of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 853, 853(a) (1983), which has forfeiture provisions identical to those of the RICO statute); *United State v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985) (attorney's fees are not a forfeitable interest under the RICO Statute). *But see* Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986) (checks on the exercise of prosecutorial discretion should prevent concern that forfeitures of attorney's fees violate the right to counsel and undermine the defense attorney's role in the adversary process).

55. *Badalamenti*, 614 F. Supp. at 198.

56. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The sixth amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U. S. CONST. amend. VI; *see also* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the sixth amendment right to the assistance of counsel is a fundamental right which is binding upon the states). For a brief examination of the history of the sixth amendment right to counsel and the Supreme Court's most recent limitation *see* Comment, *Constitutional Law—Criminal Law—Sixth Amendment Right to Counsel—Scott v. Illinois*, 25 N.Y.L. SCH. L. REV. 707 (1980).

57. *Coleman v. Alabama*, 399 U.S. 1 (1969) (the right to counsel extends beyond trial and extends to pretrial and post-trial stages of criminal proceedings where the defendant could be prejudiced by the absence of counsel); *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983) (right to counsel in a criminal proceeding applies when substantial rights of the accused may be affected, and therefore, the right extends to sentencing proceedings), *cert. denied*, 464 U.S. 1053 (1984).

58. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *see also* *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (defendant may not be imprisoned unless afforded the right to counsel); *Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983) (right to counsel turns on whether deprivation of liberty may result, not upon classification of proceedings as civil or criminal).

59. *See* *United States v. Anderson*, 567 F.2d 839, 840 (8th Cir. 1977) (*per curiam*) (if financial condition is an issue at trial, defendant may prove indigency by presenting relevant financial information to the judge *in camera*); *cf.* *Asper v. Estelle*, 709 F.2d 356, 357-58 (5th Cir. 1983) (defendant may prove indigency for appeal *in forma pauperis* by showing nearly all available funds spent on trial); *United States v. Harris*, 707 F.2d 653, 659-61 (2d Cir.) (standard for appointment of counsel under Criminal Justice Act is less than indigency or destitution), *cert. denied*, 464 U.S. 997 (1983).

60. *See* *Gideon*, 372 U.S. at 342 (sixth and fourteenth amendments require appointment

The sixth amendment requires that counsel provide "effective assistance."⁶¹ Although the courts require that counsel perform with some reasonable competence, most courts do not question tactical decisions and trial strategies,⁶² and will condemn only blatant errors.⁶³ The United States Supreme Court has specified only a few duties essential to effective assistance: the duty to act as a vigorous advocate of the defendant's cause; the duty to avoid conflict of interest;⁶⁴ the duty to inform the defendant of important developments in the course of prosecution; and the duty to act with such skill and knowledge that the trial is rendered a reliable adversarial process.⁶⁵ These basic duties are not exhaustive and courts must review the totality of the circumstances when reviewing claims of ineffective counsel.⁶⁶

of counsel for indigent defendants in state courts); *Zerbst*, 304 U.S. at 463 (sixth amendment requires appointment of counsel for indigent defendants in federal court); *cf.* *United States ex rel. George v. Lane*, 718 F.2d 226, 231 (7th Cir. 1983) (offer of court appointed counsel satisfies a state's constitutional obligation to provide defendant with legal assistance).

61. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

62. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (strategic choices made after thorough investigation are virtually unchallengeable; strategic choices made after less thorough investigation are reasonable to the extent that reasonable professional judgments support limitations on investigations); *United States v. Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (counsel's strategic decision to admit guilt on individual drug trafficking offenses and to attempt to persuade jury of defendant's innocence of continuing criminal enterprise not ineffective assistance).

63. *See, e.g., United States ex rel. Cosey v. Wolff*, 727 F.2d 656, 657-58 (7th Cir. 1984) (counsel's rejection of proffered witnesses, two of whom had no reason to be biased toward defendant, without interview or investigation was ineffective assistance), *overruled by United States v. Payne*, 741 F.2d 887 (7th Cir. 1984); *House v. Balkom*, 725 F.2d 608, 617 (11th Cir.) (counsel's failure to investigate facts is unconscionable and falls below level of performance by counsel required by the sixth amendment), *cert. denied*, 469 U.S. 870 (1984); *United States v. Winterhalter*, 724 F.2d 109, 110 (10th Cir. 1983) (*per curiam*) (counsel's failure to prosecute appeal after filing timely notice of appeal was ineffective assistance).

64. *See infra* notes 95-97.

65. *See Strickland*, 466 U.S. at 688. The fourth circuit set forth similar criteria in *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968):

Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Id. at 226.

66. *House v. Balkom*, 725 F.2d 608, 615 (11th Cir.) in considering totality of circumstances, court looks to quality of assistance from the time of initial retention through the time of appeal; seriousness of the charges must be considered in assessing counsel's performance), *cert. denied*, 469 U.S. 870 (1984); *United States v. Rusmisl*, 716 F.2d 301, 305 (5th

It is well established under the United States Constitution that a defendant subject to criminal charges has a fundamental right to counsel in judicial proceedings against him.⁶⁷ A defendant charged with a criminal violation under the RICO statute⁶⁸ is equally entitled to that same fundamental right to counsel afforded all criminal defendants.

B. *The Courts' Sixth Amendment Analysis*

In ascertaining congressional intent of the forfeiture provisions, the court in *United States v. Badalamenti*⁶⁹ was of the opinion that Congress could not have intended the broad language of the Act to apply to attorney's fees.⁷⁰ Such "a special application [is] . . . clearly at odds with an accused defendant's constitutionally guaranteed right to have counsel to defend the charge."⁷¹

The courts in *Badalamenti* and *United States v. Rogers*⁷² specifically addressed the issue of the forfeitability of attorney's fees upon conviction of a defendant.⁷³ In holding that attorney's fees are not forfeitable, the *Rogers* court relied on the legislative history of amendments to the Comprehensive Forfeiture Act⁷⁴ and the Comprehensive Drug Abuse Prevention and Control Act.⁷⁵ The *Badalamenti* court noted that the scant legislative history of the Comprehensive Forfeiture Act, which was quickly passed, produced "[n]othing of great value to the resolution [of the is-

Cir. 1983) (number, nature, and seriousness of charges, strength of prosecution's case, strength and complexity of possible defenses, and severity of sentence faced by defendant must all be considered in evaluating effective assistance claim); *United States v. Zylstra*, 713 F.2d 1332, 1338-39 (7th Cir.) (effectiveness of counsel considered in view of totality of circumstances; counsel's strategy of stipulating to allegations of activities of other members of conspiracy and of not interviewing witnesses who did not seem to have helpful information were legitimate tactical strategies constituting effective assistance), *cert. denied*, 464 U.S. 965 (1983); *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983) (per curiam) (seriousness of charges must be considered in totality of circumstances when ruling on ineffective assistance claim), *cert. denied*, 469 U.S. 1028 (1984).

67. *See supra* notes 56-60.

68. For elements of a RICO violation, *see supra* notes 8-11 and accompanying text.

69. 614 F. Supp. 194 (S.D.N.Y. 1985).

70. *Id.* at 197. The legislative history of the Act is vague, making Congress' intent difficult to ascertain. The Act was so quickly passed that not all of the Act's pages were included in the copy provided to the President for his signature. *United States v. Rogers*, 602 F. Supp. 1332, 1336 (D. Colo. 1985).

71. *Badalamenti*, 614 F. Supp. at 197; *see also Rogers*, 602 F. Supp. at 1348-49.

72. 602 F. Supp. 1332 (D. Colo. 1985).

73. *See supra* note 55 and accompanying text.

74. *Rogers*, 602 F. Supp. at 1346-48 (construing the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, amending forfeiture provisions under the RICO statute and the Comprehensive Drug Penalty Act).

75. *Rogers*, 602 F. Supp. at 1346-48 (construing the Comprehensive Drug Penalty Act of 1984, Pub. L. No. 98-473, amending 21 U.S.C. §§ 821, 824, 851, 854, 881 (1983)).

sue].”⁷⁶ The *Badalamenti* court then agreed with the *Rogers* decision, noting a House Judiciary Committee Report on the Comprehensive Drug Penalty Act, which stated, “Nothing in this section is intended to interfere with a person’s Sixth Amendment right to counsel.”⁷⁷

The issue of forfeitability of attorney’s fees was not specifically before the court in *Payden v. United States*.⁷⁸ The *Payden* court, however, cited the next sentence of the same Judiciary Committee report in an attempt to rebut the declaration that forfeiture provisions were not intended to interfere with a defendant’s sixth amendment rights.⁷⁹ “The Committee . . . does not resolve the conflict in district court opinions on the use of restraining orders that impinge on a person’s right to retain counsel in a criminal case.”⁸⁰ The *Payden* court thus reasoned that “Congress intended, not to resolve the sixth amendment conflict through this legislation, but to leave the resolution of these issues to the courts.”⁸¹

The *Badalamenti* court disagreed with the *Payden* court’s interpretation of Congressional intent.⁸² According to the court in *Badalamenti*, the sentence which the *Payden* court uses to justify its opinion that attorney’s fees are forfeitable does not address the constitutionality of forfeiture of attorney’s fees.⁸³ The *Badalamenti* court reasoned that this sentence addresses the entirely separate issue of the constitutionality of subjecting an accused’s funds to a restraining order.⁸⁴

The problem of having funds initially unavailable due to a restraining order⁸⁵ is distinct from the problem of subsequent forfeiture of attorney’s

76. *Badalamenti*, 614 F. Supp. at 197.

77. *Id.* (quoting H.R. REP. No. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984)).

78. 605 F. Supp. 839 (S.D.N.Y.), *rev’d on other grounds*, 767 F.2d 26 (2d Cir. 1985); see *supra* notes 41-43 and accompanying text.

79. *Payden*, 605 F. Supp. at 849-50 n.14.

80. See H.R. REP. No. 845, 98th Cong., 2d Sess., pt.1, at 19 n.1 (1984).

81. *Payden*, 605 F. Supp. at 850 n.14.

82. *Badalamenti*, 614 F. Supp. at 197. *Badalamenti* and *Payden* were both decided before the federal district court for the Southern District of New York. The *Badalamenti* court, however, was in a position to disagree with the *Payden* court’s opinion that attorney’s fees are forfeitable since the specific issue was not before the *Payden* court. *Id.*

83. *Id.*

84. *Id.* A conflict exists in the district courts with regard to the issuance of restraining orders to “freeze” a defendant’s assets, thereby making it difficult to pay an attorney a retainer. Compare *United States v. Meinster*, 488 F. Supp. 1342 (S.D. Fla. 1980) (court approved post-indictment transfer of assets to defendant’s retained counsel), *cert. denied*, 457 U.S. 1136 (1982) and *United States v. Mandel*, 408 F. Supp. 679, 682 (D.D.C. 1976) (court denied restraining order in particular circumstances) with *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (court approved restraining order because appointed counsel available). The constitutionality of the use of restraining orders to “freeze” a defendant’s assets before trial is beyond the scope of this comment.

85. A wealthy defendant who is subject to a restraining order cannot be considered indigent since he is not deprived of control over his property. See *BALLENTINE’S LAW DICTIONARY* 1108 (3d ed. 1969) (restraining order has no effect other than preserving the status quo until

fees. A RICO defendant's problem is not the inability to pay a legal fee, but that lawyers will refuse to accept a retainer that may later be forfeited.⁸⁶ The *Badalamenti* court stated:

The problem is the unlikelihood of obtaining a lawyer at all, if the lawyer will incur forfeiture of his fee upon the client's conviction. The Government argues that forfeiture will be denied if the money is clean.⁸⁷ This is true, but irrelevant. The right to counsel belongs to guilty defendants as well as innocent ones.⁸⁸

The right to effective assistance of counsel entitles every criminal defendant a reasonable opportunity to defend himself.⁸⁹ If the forfeiture provisions apply to attorney's fees, a criminal defendant in a RICO prosecution has been effectively denied the assistance of an attorney, an essential tool for a proper defense.⁹⁰ Therefore, the *Badalamenti* court con-

hearing upon application for a preliminary or temporary injunction); see also *United States v. Brodson*, 241 F.2d 107 (7th Cir. 1957) (restraining orders restricting defendant's assets so that he could not hire an accountant to testify at a trial for tax violations are valid where the defendant might be able to obtain funds from other sources such as bank loans), *cert. denied*, 354 U.S. 911 (1957).

86. *Badalamenti*, 614 F. Supp. at 197; see also *supra* notes 59-60. "The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office." *Rogers*, 602 F. Supp. at 1349. The consequences are traditionally held unacceptable, according to Justice Black:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the . . . [person] charged with crime has to face his accusers without a lawyer to assist him.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

87. Should an attorney have to act as judge before trial to determine if the money is clean?

88. *Badalamenti*, 614 F. Supp. at 197-98. If the fee is forfeitable it is not likely that a defendant will have any attorneys to "choose" from. A defendant has a right to choose his own counsel. *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (defendant is entitled to a fair opportunity to obtain the counsel of his choice). The right to choice of counsel, however, is not absolute. *United States v. James*, 708 F.2d 40, 44 (2d Cir. 1983).

89. *In re Oliver*, 333 U.S. 257, 275 (1948).

90. For an examination of the elements critical to a criminal defendant's sixth amendment right to counsel, see Project, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-84*, 73 GEO. L. J. 249, 573-610 (1984).

cluded that "the statute was not intended, and should not be construed to reach bona fide fees charged by the attorney for the defense of the criminal charge."⁹¹ The court concluded that if the statute were so intended, its application would run "afoul of the Sixth Amendment by effectively preventing the accused from exercising the right to counsel."⁹²

C. *Ethical Considerations and the Sixth Amendment*

In addition to constitutional problems, the issue of forfeitability of attorney's fees raises several ethical problems for an attorney hired to represent a RICO defendant. An attorney's affirmative duty to maintain a high standard of integrity and competency in his profession⁹³ may be jeopardized by accepting employment from a RICO defendant. The ethical issues which should be of grave concern to RICO defense attorneys are the attorney's affirmative duty to represent his client zealously, the danger of accepting a contingent fee in a criminal case, and intrusion into the attorney-client privilege and client confidences and secrets.

1. The Duty to Represent a Client Zealously

An attorney has an affirmative duty to represent his client zealously.⁹⁴ A RICO defense case forces an attorney into a position of conflict. The attorney's duty to be well informed on the subject of his client's case⁹⁵ may conflict with his interest in not learning facts that might endanger his fee.⁹⁶ If an attorney is to remain a bona fide purchaser under the Forfeiture Act he must not have knowledge that his fee is the proceeds of illicit activity.⁹⁷

If the attorney brings a proceeding to claim his fee as a third-party petitioner,⁹⁸ asserting he was "reasonably without cause to believe that the property was subject to forfeiture," the evidence required to prove the

91. *Badalamenti*, 614 F. Supp. at 198.

92. *Id.*

93. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1983).

94. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1983); *People v. Woods*, 117 Misc. 2d 1, —, 457 N.Y.S.2d 173, 175 (Dist. Ct. 1982) (an attorney cannot leave his client in the middle of a matter when the client does not supply him with money, because his duty to represent the client continues throughout the proceeding); see *United States v. Ramey*, 559 F. Supp. 60, 62 (E.D. Tenn. 1981) (by accepting employment as counsel for defendant in a criminal case, the attorney impliedly stipulates that he will zealously represent the client in the matter until its conclusion); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1).

95. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR6-101.

96. See *id.* DR 5-101. A lawyer should refuse employment when his own interests may impair his professional judgment (attorney's interest would be for preservation of fee while client's interest is in preservation of assets). See *supra* text accompanying note 64.

97. See 18 U.S.C. § 1963(c), (m) (Supp. II 1984).

98. *Id.* § 1963(m); see also *supra* text accompanying notes 34-37.

claim would consist primarily of privileged matter.⁹⁹ If an attorney is, in fact, without reasonable cause to suspect his client's property was subject to forfeiture, this could raise serious questions with regard to his competence, since an attorney is obligated to exercise due diligence to inform himself of all relevant facts in his client's case.¹⁰⁰ Thus, there is a danger that an attorney will represent a RICO defendant less zealously than a defendant in any other type of case in order to protect his opportunity to collect his fee.¹⁰¹ If an attorney is guilty of less than zealous representation of his client, that client, in effect, has been deprived of his right to competent and effective counsel.

2. Contingent Fees in a Criminal Case

The acceptance of a contingent fee in a criminal case is strictly forbidden.¹⁰² A contingent fee is an arrangement between attorney and client whereby the attorney agrees to represent the client with compensation dependent on a favorable verdict in a case.¹⁰³ If a defendant is acquitted he pays his attorney, and if a defendant is found guilty he does not pay his attorney.

If an attorney agrees to represent a RICO defendant, and the defendant is acquitted, the defendant's property will not be subject to a forfeiture order.¹⁰⁴ An acquittal, therefore, leaves the defendant with sufficient and unencumbered funds to pay his attorney. Upon payment of the attorney's fee, however, the attorney may have accepted the equivalent of a contingent fee in a criminal case. If the RICO defendant's fee is construed as a contingent fee, the attorney has violated the prohibition on contingent fee arrangements in criminal cases.¹⁰⁵ If a defendant is found guilty, and the forfeiture provisions of section 1963 apply to attorney's fees, then the attorney's fee will be forfeited to the government.¹⁰⁶ The attorney, therefore, will receive no compensation for his work.

The forfeiture provisions of section 1963, if they apply to attorney's fees, place an attorney in such a position that he cannot ethically or fi-

99. *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985). Such threats of future disclosure tend to have the present effect of chilling free and open communications between attorneys and clients. *Id.*

100. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1983).

101. *Rogers*, 602 F. Supp. at 1348.

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1983); see also *Peyton v. Margiotti*, 398 Pa. 86, 156 A.2d 865, 867-68 (1959) (contingent fees in criminal cases are illegal and void as against public policy).

103. *BALLENTINE'S LAW DICTIONARY* 260 (3d ed. 1969).

104. See 18 U.S.C. §§ 1961-68 (1982).

105. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1983) (prohibits contingent fee arrangements in criminal cases).

106. See 18 U.S.C. § 1963.

nancially afford to accept a RICO case. From an ethical standpoint, it is doubtful that many attorneys are willing to sacrifice their reputations by violating the Code of Professional Responsibility. Furthermore, given the complexity of RICO proceedings, chances are slim that a RICO defendant will be able to acquire an attorney to work on his case free of charge.¹⁰⁷ Since a RICO defendant will not be able to find an attorney if the fee is forfeitable, the defendant has been deprived of his sixth amendment right to counsel.

3. The Attorney-Client Privilege

Confidences disclosed by a client to an attorney in the context of a legal relationship are protected by the attorney-client privilege.¹⁰⁸ The privilege, however, protects only those disclosures necessary to obtain legal advice.¹⁰⁹

A RICO defense attorney may encounter ethical problems involving the attorney-client privilege. If an attorney is called to testify in a judicial proceeding with regard to his client's identity or fee information, he may be forced to incriminate his client.¹¹⁰ Absent "special circumstances," client identity and fee information are not privileged.¹¹¹ A RICO proceeding, however, should be considered a "special circumstance" in which fees and client identity are privileged since this information is more sensitive in RICO prosecutions than in other criminal prosecutions. This information in a RICO case is essential to free and open communication between the attorney and his client.¹¹²

In *Shargel v. United States*,¹¹³ the court refused to recognize a RICO case as a "special circumstance." In *Shargel*, a RICO defense attorney was served with a grand jury *subpoena duces tecum* requiring the attorney to reveal fee information and property transfers involving his client.¹¹⁴ The court interpreted the scope of the attorney-client privilege strictly and held that the district court properly denied the motion to

107. See *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985); see *supra* note 86.

108. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983); see *Fisher v. United States*, 425 U.S. 391, 403 (1976). For a general discussion of the attorney-client privilege and constitutional implications see Note, *Attorney-Client Communications of Criminal Defendants: Evidentiary and Constitutional Protections*, 62 WASH. U.L.Q. 739 (1985).

109. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

110. See *supra* note 96.

111. This result follows from defining the privilege to encompass only those confidential communications necessary to obtain legal advice. *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); cf. *United States v. Pape*, 144 F.2d 778, 783 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944).

112. See *supra* note 99 and accompanying text.

113. 742 F.2d 61 (2d Cir. 1984).

114. *Id.* at 61-62.

quash the subpoena.¹¹⁵ The court stated that identification of individuals as clients of an attorney and revealing fee information neither disclosed nor implied a confidential communication, and therefore were not privileged.¹¹⁶

However, several recent federal district court decisions indicate that the attorney-client privilege may be interpreted more liberally to include client identity and fee information in certain circumstances.¹¹⁷ The courts may recognize a RICO prosecution as a "special circumstance." Client identity and fee information would possibly become privileged in a RICO prosecution, since the amount of an attorney's fee may show the substantial income element of a RICO offense.¹¹⁸

In *In re Grand Jury Matters*,¹¹⁹ grand jury subpoenas were issued to attorneys who, in state criminal prosecutions, were then serving as defense counsel for the same persons the federal grand jury was investigating. The First Circuit Court of Appeals held that the district court did not exceed its discretion in finding the timing of the subpoenas to be inappropriate.¹²⁰ The language of the opinion indicates that the federal courts may, in their discretion, recognize "special circumstances."¹²¹

The major concern expressed by the court was that requiring an attorney to become a witness against his client may disqualify the attorney from representing his client in possible federal proceedings, and may require the attorney to withdraw from the state criminal proceedings.¹²² The court also expressed concern that testimony by the attorney against his client may drive a wedge between attorney and client.¹²³ A defendant

115. *Id.* at 65.

116. *Id.* at 63; see also *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983) (identity of client not within privilege), *cert. denied sub nom. Durant v. United States*, 467 U.S. 1246 (1984); *Osterhoudt v. United States*, 722 F.2d 591, 593-94 (9th Cir. 1983) (information regarding fee arrangement not privileged); *In re Application of Doe*, 603 F. Supp. 1164, 1168 (E.D.N.Y. 1985) (privilege did not preclude grand jury questioning counsel).

117. See, e.g., *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985).

118. See 18 U.S.C. §§ 1961-68 (1982).

119. 751 F.2d 13 (1st Cir. 1984).

120. *Id.* at 19 (the court feared that disclosure of information at the time the subpoenas were issued might be detrimental to the defendant in a state court proceeding in progress at the time).

121. *Id.* at 17. The grand jury's right to evidence is substantially limited only by express constitutional, common-law, or statutory privileges and its powers are subject to the judge's supervisory powers. *Id.*

122. *Id.*; see also *supra* note 52.

123. *Grand Jury Matters*, 751 F.2d at 19; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1983) (a client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client).

would be deprived of his attorney in the first instance, and have his attorney-client relationship destroyed in the second instance. Each of these situations seriously endangers a defendant's sixth amendment right to effective counsel. In its opinion, however, the court emphasized that a decision to disallow attorney testimony is a discretionary one to be determined on the facts of each case.¹²⁴ The court may use its discretion, even when trial is pending, to determine that the grand jury's right to what would normally be unprivileged evidence outweighs the right of the defense bar not to be disturbed.¹²⁵

The court in *United States v. Badalamenti*¹²⁶ also adopted a less restrictive stance on the scope of the attorney-client privilege.¹²⁷ The court held that the Government must show both *relevance* and *need* in order to secure enforcement of a subpoena of the defendant's lawyer to obtain fee information.¹²⁸ In examining these two factors, the court decided that fee information was relevant to satisfaction of the "substantial income" element of a RICO offense,¹²⁹ but that the government could satisfy the need element by less intrusive means.¹³⁰

Therefore, the *Badalamenti* court quashed the subpoena and emphasized that in certain factual situations fee information should be protected.¹³¹ "Here the subpoena was not served until ten months after the return of the indictment and six months after [counsel's] appearance in a case of gargantuan proportions. The loss to the defendant of his counsel under these circumstances would have a vastly greater impact on his sixth amendment rights."¹³² The court in *Badalamenti* appeared to recognize that a RICO prosecution presents a novel situation which falls outside the general rule that fee information is not privileged.

The opinions in *In re Grand Jury Matters* and *Badalamenti* emphasize the importance of the attorney-client privilege in criminal cases.¹³³ This privilege is so important that it should not be interfered with absent a compelling reason.

124. *Grand Jury Matters*, 751 F.2d at 17.

125. *Id.* at 19.

126. 614 F. Supp. 194 (S.D.N.Y. 1985).

127. *Id.* at 199; see also *supra* notes 109, 111 and accompanying text (the attorney-client privilege is strictly construed absent "special circumstances").

128. *Badalamenti*, 614 F. Supp. at 199.

129. See *supra* note 118 and accompanying text.

130. *Badalamenti*, 614 F. Supp. at 199.

131. *Id.* at 201.

132. *Id.* at 198.

133. Other courts have also emphasized the importance of the privilege. See *Roe v. United States*, 759 F.2d 968, 973 (2d Cir. 1985) (before an attorney may be called before a grand jury the government must make a preliminary showing of relevance and reasonable need); see also *Application of Doe*, 603 F. Supp. at 1164 (the court indicated its willingness to allow an attorney to claim attorney-client privilege to refuse to disclose fee arrangements to the grand jury in exceptional circumstances).

IV. CONCLUSION

The problem of forfeiture of attorneys fees under RICO and its 1984 amendments presents clear conflicts between the language of the RICO statute, attorney ethics, and the sixth amendment. These are not conflicts Congress could have intended to create in drafting the statute.¹³⁴ The sixth amendment right to counsel cannot be overridden by statute.¹³⁵ The canons of attorney ethics¹³⁶ are established principles that are too important to be overridden by statute.

As the RICO statute is presently written, the federal courts must balance each of these interests and rights and decide which is the most compelling.¹³⁷ However, Congress must not allow the issue of forfeitability of attorneys fees to be open to various interpretations by the federal courts. In order to safeguard the principles of the legal profession and the sixth amendment right to counsel, Congress must amend the RICO statute to make it clear that attorney's fees cannot be a "forfeitable interest" under the statute. A RICO defendant, guilty or innocent, will then be assured of adequate representation in all jurisdictions, and the statute will accomplish its far-reaching purpose of eliminating the infiltration of organized crime into legitimate business enterprises.¹³⁸

Elizabeth E. Stanulis

134. See *supra* notes 5, 18 and accompanying text.

135. See *supra* notes 56-67 and accompanying text.

136. See *supra* notes 93-96, 99-102, 108 and accompanying text.

137. See *supra* notes 52-55 and accompanying text.

138. See *supra* note 24.



M. RAY DOUBLES
1900-1987

